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IN THE

Supreme Court of the United States

October Term 1969

No. 373

HERBERT S. SCHWARTZMAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Herbert S. Schwartzman, prays that a writ of certiorari issue to review the judgment of the New York State Court of Appeals entered March 6, 1969, reargument denied April 24, 1969.

Opinion Below

The opinion of the Court of Appeals of the State of New York, printed as Exhibit A in the Appendix hereto, is officially reported at 24 N.Y. 2d 241.

There was no opinion written on the trial level or by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

Jurisdiction

The jurisdiction of this Court is apparently sought pursuant to 28 U.S.C. § 1257 (3), it being argued that the petitioner's Fourteenth Amendment rights circumscribed by the due process clause were wrongly interfered with because of the latitude granted the District Attorney by the Trial Judge in cross-examining petitioner regarding prior criminal and immoral acts.

Question Presented

The sole issue raised by the petition has to do with the fairness of a ruling by the Trial Judge that resulted in the cross-examination of the petitioner regarding prior but similar false pretense larcenies and associated frauds approximating that charged in the indictment, both in character and point of time. Documents relating to the prior criminal and immoral conduct of the petitioner were utilized by the Trial District Attorney during the cross-examination of Schwartzman. The dissent below differed with the majority regarding the use of the documents during the cross-examination and their competency as evidence.

The petitioner contends that the tenure of the trial sunk below the minimum requirements of due process, whereas the respondent denies it.

The Evidence

The first witness called on behalf of the prosecution was Roslyn Gladstone who testified she met the defendant for the first time on the morning of September 25, 1964 at the Meadowbrook National Bank branch in Manhasset pursuant to an appointment arranged by her husband, William Gladstone (30-31).

She testified the defendant-appellant, Herbert Schwartman, offered her an invoice on a shipment from his company, Safety Circuit Corporation, of the face value of $1,592 for the discount price of $1,000. She inquired of him, "Is the invoice good? Is it free and clear?" He replied to her, "Yes, it is" and gave her a letter which was on the stationery of Safety Circuit Corporation, dated that day, September 25, 1964 and which reads as follows (33):

> "Dear Mrs. Gladstone:
>
> In consideration of the receipt of $1,000 by check subject to collection, as purchase price, we herewith sell, assign and convey to you unconditionally and irrevocably our account receivable due from the Department of Purchases, Municipal Building, New York City, our invoice No. 1123, dated August 21, 1964 in the amount of $1,592; that invoice is owned free and clear by us. Copy of the invoice is attached herewith.
>
> Safety Circuit Corporation
> By Herbert Schartzman, President."

She proceeded to write out a check which she then cashed at the bank and gave the defendant-appellant one thousand dollars in cash (35). She testified she would not have entered into this deal and given Mr. Schwartzman the one thousand dollars if she had known that the invoice was not free and clear (36). She never collected the money on the invoice (39).

Mrs. Gladstone on cross-examination emphasized the fact that this was not a loan to the defendant, Herbert Schwartzman and that the invoice was not taken by her as security (65). She further testified that on occasion, she has taken advice from her husband but that her husband did not have authority in this transaction to act for her as her agent (68).

The next witness for the People was Lester Balagur who testified he knew the defendant in this case, Herbert

Schwartzman, and had financial dealings with Mr. Schwartzman in August 1964 (114-116).

He testified that on August 21, 1960, he accompanied the defendant when the defendant made a shipment of merchandise from his corporation to the City of New York and the defendant assigned to him an invoice for this shipment as security for a loan which this witness gave to the defendant of $1,400 (120-123).

It was not contested at the trial that this was the same invoice which was subsequently sold to Mrs. Gladstone.

Mr. Balagur testified that his transaction with the defendant-appellant concerning invoice No. 1123 was a secured loan rather than a sale and further that he never collected on the promissory note (132-136).

The next witness called by the People was Detective William I. Coningsby of the Nassau County Police Department who testified that pursuant to the investigation, he had a conversation with the defendant in March of 1965 concerning the underlying transaction herein (201). He testified that Mr. Schwartzman admitted to him that he owed Mrs. Gladstone a thousand dollars which he hadn't paid because he thought Mrs. Gladstone was charging too much interest (203).

Samuel W. Cohen was the next witness for the People (226). He was an employee of the Department of Purchase of the City of New York who was apparently called to testify concerning the official records of the Department of Purchase, but his testimony was of little value since he was not able to testify that his records covered purchases of the New York City Police Department (228).

The Defense

The first witness called by the defense was Carolyn Woodley who testified she worked for Safety Circuit Corporation and its President, Herbert Schwartzman

(249) for approximately one year leaving the defendant-appellant's employ approximately three weeks before the transaction with Mrs. Gladstone (250).

While she was employed at Safety Circuit Corporation in August 1964, she accompanied the defendant at one time to New York City where he met with William Gladstone, a Mr. Albert Martin and a Mr. Merritt. She observed the defendant signing some papers at that meeting, which meeting was not attended by the complainant, Roslyn Gladstone (251-259).

The next defense witness was William Gladstone, the complaining witness' husband (265). He testified that he was an officer of a corporation known as Key To The Fair, Inc. a corporation in which his wife owned stock (266). He further testified that in August 1964, the corporation loaned the defendant-appellant's corporation eight thousand dollars and the defendant-appellant personally guaranteed the loan and gave Key To The Fair, Inc. a chattel mortgage (271-272).

Mr. Gladstone testified that the account receivable was bought by his wife for one thousand dollars and was not assigned to her as collateral security for a loan (290). Mr. Gladstone admitted that he attempted to recover from the defendant-appellant on this account receivable on behalf of his wife, but he further testified that he also sought payment from the City of New York (291).

This witness testified that he contacted his wife on the morning of September 25, 1964 from the defendant's office and arranged the meeting in his wife's bank in Manhasset (306). He testified he was present in the defendant's office when the letter addressed to his wife was dictated, but he further testified that he did not have a check for a thousand dollars with him at that time.

Mr. Gladstone did admit that this transaction started out as a loan but that it was changed to an out and out

sale because the proposed interest on the loan would not be sufficient to justify the risk involved (315).

Most significantly, the witness testified that he had no authority to act on behalf of his wife in this particular transaction (327).

The next witness called by the defense was the defendant-appellant, Herbert Schwartzman (334). He testified he met William Gladstone in August of 1964 at the office of Albert Martin (336); that was when he was negotiating the loan with Key To The Fair Inc. He discussed with Mr. Gladstone at that time the financial condition and assets of Safety Circuit Corporation relative to putting up security for the loan from Key To The Fair Inc. which Mr. Gladstone represented as Vice-President (339).

Mr. Schwartzman admitted on direct examination that he assigned the invoice in question numbered 1123 to Mr. Balagur in that he executed a letter of assignment to that effect (364).

Herbert Schwartzman further admitted that he signed the letter of assignment to Mrs. Gladstone (People's Exhibit 2), but he said that it had been dictated by Mr. Gladstone in the Safety Circuit Office.

He testified that Mr. Gladstone then arranged to meet his wife and they all went to the bank so that they could cash the thousand dollar check (379). He then received a thousand dollars from Mr. Gladstone who had received it from his wife and that was the end of the transaction (380). He never spoke with Mrs. Gladstone besides meeting her and he never handed her the letter he had signed (People's Exhibit 2—380)

The cross-examination of this defendant was largely concerned with an attack on his credibility as a witness and a demonstration of his criminal intent. In this connection he was questioned concerning a transaction with a Florence Goldfarb and a chattel mortgage on a 1962

Cadillac. During the course of the examination Mr. Schwartzman admitted that at the time he signed an affidavit that he owned the Cadillac free and clear that, in fact, he was not the owner but the lessee of the car. He received four thousand dollars in return for that chattel mortgage (398-417).

Mr. Schwartzman was cross-examined on another chattel mortgage on the same 1962 Cadillac which he did not own and for which he got eighteen hundred and fifty dollars by representing that he did own the Cadillac car (418-424).

The prosecutor then cross-examined the defendant on a check given to the Olympic Ski Shop in Manhasset which check for two hundred and sixty-five dollars was not paid.

Mr. Schwartzman was then questioned about other checks he had given to an electrical supply house and a car wash, a fuel oil company and even the head waiter at a local restaurant. On some occasions, the defendant stated, he issued a check intending to stop payment of it (432). In other transactions, he testified, he did not know why the checks had not been paid or else he had no recollection of the transactions (436).

On another occasion, he admitted that he issued a check for seventeen hundred and twenty-five dollars when he knew he did not have that much money in the bank (448).

Mr. Schwartzman was also questioned about several rings which he may or may not have taken title to and paid for (448-451).

He further testified that he gave a series of checks to a Children's Camp which checks never cleared. He also admitted giving a check to an Ed Kraus for thirty-five hundred dollars which check he never intended to be paid (464-465).

Along with all these other transactions, the defendant was asked on cross-examination about a hundred dollar

check given to a Charles Mendel in May of 1964. The question was posed to the defendant as to whether he recollected that check. His answer was unresponsive in that after he said, "Yes" he then volunteered the statement that "The Judge threw that out in the Courtroom" (467-468).

At no time had Mr. Schwartzman been asked by the prosecutor whether he had done anything improper in connection with that check to Mr. Mendel, but nevertheless Mr. Schwartzman's attorney at that point moved for a mistrial, which motion was denied (468).

The Writ Should Be Disallowed.

There are no compelling reasons for granting the writ because the New York State Court of Appeals did not decide a federal constitutional question heretofore undetermined by this Court. Moreover, the Court of Appeals has not decided this case in a way probably not in accordance with any prior controlling decision of this Court.

We are relying upon the majority decision in the Court below to support or suggestion that the petitioner was not deprived of due process. As a matter of fact, if we read the dissent correctly, they do not premise their position upon the Fourteenth Amendment.

CONCLUSION

The Writ Should Be Denied

Respectfully submitted,

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APPENDIX A

Opinion of New York Court of Appeals

PEOPLE *v.* SCHWARTZMAN [24 N Y 2d 241]

Statement of Case

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* HERBERT S. SCHWARTZMAN, Appellant.

Argued November 25, 1968; decided March 6, 1969.

Crimes—evidence—on trial of defendant for selling account receivable that had been previously assigned, cross-examination of defendant as to other criminal acts was relevant to impeach defendant's credibility and court's permitting same was proper exercise of discretion—documents as to five transactions, all but one being admitted, were used; use of documents as to disputed transaction during cross-examination was not improper impeachment on collateral matter since documents were independently admissible on issue of defendant's intention to defraud—permitting evidence of intention to defraud, not on main case, but on cross-examination, was proper exercise of discretion—error to cross-examine defendant as to crime of which he had been acquitted but error was harmless—no exception having been taken to Judge's comment on defendant's right to appeal, alleged error was not saved for review.

1. Defendant, as president of a corporation, was charged with selling an account receivable of the corporation, representing that the receivable was unencumbered when actually it had been previously assigned. Defendant testified in his own behalf that the purchaser's husband acted as her agent and knew of the prior assignment. Defend-

ant was cross-examined as to instances of misconduct involving the issuing of numerous worthless checks, repeated mortgaging of an automobile which he did not own, sale of mortgaged property upon the representation that the property was unencumbered, wrongfully retaining money received as agent in the sale of an automobile, and refusal to return or pay for a valuable ring received from a jeweler on approval. All these transactions were relevant to impeach his credibility as a witness and the inquiry into them was allowed as a proper exercise of the trial court's discretion.

2. Defendant admitted the transaction for which he was indicted but his intention to defraud was in dispute. Documentary evidence was used in cross-examination as to five transactions. Defendant admitted all but one of them—a chattel mortgage of a Cadillac to a named person. As to this one transaction, the use of the copy and original of the chattel mortgage during cross-examination did not constitute improper impeachment on a collateral matter since the documents not only impeached defendant's credibility, but were also independently admissible on the essential issue of defendant's intention to defraud in the crime charged. The jury was therefore properly instructed that they could give this evidence its logical probative weight on the issues of defendant's credibility and intention.

3. While procedural orderliness requires a party to adduce all his proof during his direct case, here the People were confronted with defendant's explanation that the assignee's husband knew of the prior assignment and it was within the discretion of the court to permit the use of documentary evidence relevant to defendant's intention to defraud during cross-examination.

4. It was error for the People to cross-examine defendant with respect to a crime of which defendant had been acquitted. One answer was involved and could not have influenced the result in view of the strong evidence of defendant's guilt. The error was harmless (Code Crim. Pro., § 542).

5. Where defendant made no objection or exception to the Judge's comment upon his right to appeal, and made no request to charge differently, the alleged error was not saved for review.

People v. *Schwartzman*, 30 A D 2d 917, affirmed.

APPEAL, by permission of the Chief Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 8, 1968, affirming a judgment of the County Court of Nassau County (MARTIN M. KOLBRENER, *J.*), rendered upon a verdict convicting defendant of grand larceny in the first degree.

John Joseph Sutter for appellant. I. The cross-examination of defendant by the court and prosecutor exceeded all permissible limitations and denied him both a fair trial and due process of law. (*People* v. *Webster*, 139 N. Y. 73; *People* v. *Sorge*, 301 N. Y. 198; *People* v. *Moore*, 20 A. D. 2d 817; *People* v. *Jones*, 297 N. Y. 459; *People* v. *Brown*, 284 N. Y. 753; *People* v. *Johnston*, 228 N. Y. 332; *People* v. *McCormick*, 303 N. Y. 403; *People* v. *Duncan*, 13 N Y 2d 37; *People* v. *Russell*, 266 N. Y. 147; *People* v. *Zackowitz*, 254 N. Y. 192.) II. The cross-examination of defendant on a crime for which he had been acquitted is prejudicial per se. (*People* v. *Santiago*, 15 N Y 2d 640). III. The cross-examination of defendant by the court was of such a nature as to indicate communicable disbelief of defendant. (*People* v. *Ohanian*, 245 N. Y. 227; *People* v. *Knapper*, 230 App. Div. 487;

People v. *Mendes*, 3 N Y 2d 120; *People* v. *Perry*, 277 N. Y. 460; *People* v. *Farrell*, 7 A D 2d 642; *People* v. *Montanaro*, 272 App. Div. 834; *People* v. *Adler*, 274 App. Div. 820.) IV. The court's charge to the jury concerning the purpose of receiving in evidence proof of other illegal activities was clearly erroneous. (*People* v. *Molineux*, 168 N. Y. 264; *Mayer* v. *People*, 80 N. Y. 364; *People* v. *Katz*, 209 N. Y. 311; *People* v. *De Garmo*, 179 N. Y. 130; *People* v. *Marino*, 271 N. Y. 317; *People* v. *Doty*, 175 N. Y. 164; *People* v. *Malkin*, 250 N. Y. 185). V. The court's charge to the jury concerning defendant's right to appeal is prejudicial vitiates the trial and is a denial of the constitutionally secured right to a trial by jury in a felony prosecution. (*People* v. *Johnson*, 284 N. Y. 182; *People* v. *Lynch*, 284 N. Y. 239; *People* v. *Sherwood*, 271 N. Y. 427; *People* v. *Esposito*, 224 N. Y. 370; *United States* v. *Fiorito*, 300 F. 2d 424; *People* v. *Silverman*, 252 App. Div. 149; *Duncan* v. *Louisiana*, 391 U. S. 145; *People* v. *Bradner*, 107 N. Y. 1; *Cancemi* v. *People*, 18 N. Y. 128; *People* v. *Miles*, 289 N. Y. 360). VI. The totality of the trial coupled with the cumulative effect of prejudicial errors was such as to deny defendant a fair trial and due process of law. (*People* v. *Becker*, 210 N. Y. 274; *People* v. *Wolf*, 183 N. Y. 464; *People* v. *Savvides*, 1 N Y 2d 554; *People* v. *Bai*, 7 N Y 2d 152; *People* v. *Mleczko*, 298 N. Y. 153; *People* v. *Rosenfeld*, 11 N Y 2d 290; *People* v. *Jackson*, 7 N Y 2d 142; *People* v. *Marendi*, 213 N Y 600.)

William Cohn, District Attorney (*Henry P. De Vine* of counsel), for respondent. I. The trial was fair, (*La Beau* v. *People*, 34 N. Y. 223; *People* v. *Ramistella*, 306 N. Y. 379; *Matter of Friedel* v. *Board of Regents of State of N. Y.*, 296 N. Y. 347; *People* v. *Malkin*, 250 N. Y. 185; *People* v. *Sorge*, 301 N. Y. 198; *People* v. *Buchalter*, 289 N. Y. 181; *People* v. *Santiago*, 15 N Y 2d 640; *People* v. *Tait*, 234 App. Div. 433, 259 N. Y. 599; *Sims* v. *Sims*,

75 N. Y. 466). II. The charge was not prejudicial. (*People* v. *McQueen*, 18 N Y 2d 337.)

JASEN, J. This appeal presents a question involving the nature and extent of permissible cross-examination of a criminal defendant concerning crimes which are not charged in the indictment.

Defendant was the president of Safety Circuit Corporation which appears to have been in financial difficulty in 1964. Roslyn Gladstone purchased an account receivable of the corporation from defendant on September 25, 1964 for $1,000. Defendant signed a letter to Mrs. Gladstone representing that the receivable was unencumbered. Actually, defendant had previously assigned this account receivable to one Lester Balagur as security for a loan and Mrs. Gladstone was consequently unable to collect it. Defendant admitted during his direct testimony at trial that the account had been assigned twice. His only defense was that Mrs. Gladstone's husband acted as her agent and knew of the prior assignment. Mr. Gladstone testified for the defense, but denied that he knew of the prior assignment. Defendant was convicted after trial by jury of grand larceny in the the first degree and sentenced to imprisonment for 2½ to 5 years. The Appellate Division unanimously affirmed.

On appeal defendant contends that he was denied a fair trial because he was improperly cross-examined concerning other criminal acts. The record discloses that the cross-examination of defendant was extensive, and that the District Attorney attempted to impeach his credibility by inquiry into some 22 alleged similar instances of misconduct. The allegations of defendant's other misconduct involved numerous worthless checks, repeated mortgaging of a car which he did not own, sale of mortgaged property upon the misrepresentation that the property was unencumbered, wrongfully retaining money received

as agent in the sale of a car, and refusal to return or pay for a valuable ring received from a jeweler on approval.

The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge (*Langley* v. *Wadsworth,* 99 N. Y. 61, 63.) It is well settled that a defendant who chooses to testify may be cross-examined concerning any immoral, vicious, or criminal acts which have a bearing on his credibility as a witness. (*People* v. *Webster,* 139 N. Y. 73; Richardson, Evidence [9th ed.], § 510.) The offenses inquired into on cross-examination to impeach credibility need not be similar to the crime charged, and questions are not rendered improperly merely because of their number provided they have some basis in fact and are asked in good faith. (*People* v. *Sorge,* 301 N.Y. 198, 200; *People* v. *Alamo,* 23 N Y 2d 630.) Nor does a negative response by a defendant preclude further inquiry by the prosecutor in a legitimate effort to cause the defendant to change his testimony. Otherwise, a "witness would have it within his power to render futile most cross-examination." (*People* v. *Sorge, supra,* p. 201.)

All of the transactions concerning which defendant was cross-examined involve allegations of obtaining money by worthless checks or by other false representations and were, therefore, relevant to impeach his credibility as a witness. The inquiry into these transactions to impeach defendant's credibility therefore, was within the range of the trial court's discretion.[1] (*People* v. *Sorge, supra,* pp. 201-202; *People* v. *Casey,* 72 N. Y. 393, 398-399.)

---

[1] With the exception of one transaction involving a check issued to one Charles Mendell concerning which defendant was tried and acquitted prior to the instant trial. This incident is discussed at pages and of this opinion.

Appendix A

In addition to cross-examining the defendant as to these numerous previous criminal acts, the District Attorney also used documentary evidence to assist his examination. The use of this documentary evidence during cross-examination, the defendant maintains, constitutes impermissible use of extrinsic evidence on collateral matters.

The general rule is that a cross-examiner cannot *contradict* a witness' answers concerning collateral matters by producing extrinsic evidence for the *sole purpose* of impeaching credibility. (*People* v. *Sorge, supra,* p. 201; *People* v. *McCormick,* 303 N. Y. 403; *People* v. *Duncan,* 13 N Y 2d 37; *People* v. *Perry,* 277 N. Y. 460; *People* v. *Malkin,* 250 N. Y. 185; Richardson, evidence, *supra,* §§ 503, 510.) However, an exception to this rule exists where the evidence sought to be introduced is relevant to some issue in the case *other than* credibility or if independently admissible to impeach the witness. (3 Wigmore, Evidence [3d ed.], §§ 1003, 1004, 1021; CPLR 4513; *State* v. *Gilmore,* 42 Wn. 2d 624 [1953]; *People* v. *Clark,* 63 Cal. 2d 503, 505; *Hanover Ins. Co.* v. *Johnson,* 397 S. W. 2d 904 [Texas, 1965]; *Commonwealth* v. *Heller,* 369 Pa. 457, 463 [evidence of other offenses tending to prove motive can be used to contradict a defendant's answers on cross-examination]; 3 Wharton's Criminal Evidence [11th ed., 1935], § 1293; 98 C. J. S., Witnesses, § 633; cf. *Attorney-General* v. *Hitchcock,* 1 Exch. 91, 99; cf. Richardson, Evidence, *supra,* § 503; cf. comment, Use of Bad Character and Prior Convictions to Impeach a Defendant-Witness, 34 Fordham L. Rev. 107, 111-112 [1965]; cf. *United States* v. *Herr,* 338 F. 2d 607, 611 [7th Cir., 1964], cert. den. 382 U. S. 999). The reason for this exception to the collateral evidence rule is evident from the policy considerations underlying the general rule. The collateral evidence rule is said to rest upon auxiliary policy considerations of preventing undue confusion of issues and unfair surprise

by extrinsic testimony. (3 Wigmore, *supra,* §§ 979, 1002.) Also, testimonial errors concerning distant and unconnected points are of inferior probative value.

However, the objection of confusion of issues is inapplicable if the evidence sought to be introduced is admissible for any purpose other than contradiction. Likewise, it is not unfair to expect a party to refute testimonial errors when the subject of the error is a material issue in the case, for upon such subjects the parties should in any event come prepared. Therefore, the policy objections to the contradiction of a witness' answers are inapplicable if evidence of the fact contradicted would be admissible for any purpose independent of the contradiction. It follows that a fact is not a collateral matter if it could be shown in evidence for any purpose independent of the contradiction. (*State* v. *Gilmore, supra; People* v. *Clark, supra; United States* v. *Herr, supra;* 3 Wigmore, *supra,* §§ 1003, 1004, 1021.)

Thus, when a witness testifies concerning a fact material to the case, he may be contradicted either by cross-examination or by introduction of other evidence. (*Wells* v. *Kelsey,* 37 N. Y. 143; *Hynes* v. *McDermott,* 82 N. Y. 42, 52; *Becker* v. *Koch,* 104 N. Y. 394; *Carlisle* v. *Norris,* 215 N. Y. 400, 410; 1 Mottla, New York Evidence, Proof of Cases, [2d ed., 1966], § 431; 3 Wigmore, *supra,* §§ 1003, 1004, 1021; 3 Wharton's Criminal Evidence, *supra,* § 1293; 98 C. J. S., Witness, *supra,* § 633; *People* v. *Gilmore, supra; People* v. *Clark, supra.*) Also, evidence of other crimes has long been held admissible to establish the motive or intention of a defendant. (*People* v. *Molineux,* 168 N. Y. 264; *People* v. *Dales,* 309 N. Y. 97.) It follows that where intention to defraud is an essential element of the crime charged, such as here, evidence competent to establish criminal intention is not a collateral matter with respect to cross-examination. (*State* v. *Gilmore, supra;*

People v. *Clark, supra;* 3 Wigmore, *supra,* §§ 1003, 1004, 1021; *Commonwealth* v. *Heller, supra.*)

The issue, therefore, narrows to whether defendant's answers on cross-examination were contradicted, and, if so, whether the evidence used to impeach his answers was admissible for any purpose independent of the contradiction.

Nine documents relating to seven distinct transactions were utilized in the cross-examination of defendant. Defense counsel did not object to the use of two memoranda relating to defendant's refusal to return or pay for a valuable ring which he received from a jeweler on approval. Documents relating to an assignment of letters patent were also used. Defendant admitted the transaction, but the trial court halted the cross-examination concerning this transaction because the prosecution had failed to prove any wrongdoing.

The transactions to which defendant objected to the use of documentary evidence during cross-examination are five—three instances of defendant's mortgaging a 1962 Cadillac which he did not own and two examples of passing worthless checks. However, a close examination of the record reveals that defendant admitted all but one transaction during cross-examination—that of a chattel mortgage of a 1962 Cadillac to one Florence Goldfarb. Concerning this one transaction, defendant first admitted during cross-examination that he gave the chattel mortgage, and defense counsel stipulated that defendant received $4,000 from Florence Goldfarb for the chattel mortgage when in fact he did not own the car. Defendant then repudiated his counsel's stipulation, stating that he did not obtain $4,000 from Florence Goldfarb, but that the chattel mortgage was to Hy Gold or Hy Goldfarb. At this juncture, defendant basically admitted the transaction, but questioned the identity of the mortgagee. His answers, however, were highly evasive and the prosecutor handed

him a copy of the chattel mortgage. Defendant then admitted that the signature on the mortgage was similar to his own, but denied signing the exhibit. He was shown the original chattel mortgage at the conclusion of his cross-examination, but also denied signing the original document.

As to this one transaction which defendant denied, we conclude that the use of a copy and the original of the chattel mortgage during cross-examination does not constitute improper impeachment on a collateral matter since the documents not only impeached defendant's credibility, but were also *independently* admissible on the essential issue of defendant's intention to defraud in the crime charged.

The rules governing the admissibility of evidence of other crimes represent a balance between the probative value of such proof and the danger of prejudice which it presents to an accused. When evidence of other crimes has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged, it should be excluded. "Where, however, it is relevant to negative the existence of accident or mistake, or to show the intent or motive with which the defendant acted, or a common scheme or plan, its probative value is deemed to outweigh the danger of prejudice, and the rules dictating exclusion will yield." (*People* v. *Dales, supra,* p. 101; see also, *People* v. *Molineux, supra,* pp. 291-294; *People* v. *Gaffey,* 182 N.Y. 257; 2 Wigmore, *supra,* §§ 300-307; McCormick, Evidence [1954], § 157.) Evidence of other similar crimes is particularly appropriate where, as in the instant case, the defendant is charged with larceny by false pretenses. (*People* v. *Molineux, supra,* pp. 297-299; *People* v. *Peckens,* 153 N.Y. 576; *Mayer* v. *People,* 80 N.Y. 364.)

In this case defendant admitted obtaining $1,000 from Mrs. Gladstone by assigning an encumbered account re-

ceivable to her. Since he admitted the transaction, his intention is the only fact in dispute. However, the acts involved in assigning the receivable are equivocal, and the underlying intention is not easily inferred from the acts alone. Thus evidence of successive similar misrepresentations by defendant is crucial in attempting to ascertain defendant's intention concerning the crime at bar. (See, e.g., *People* v. *Dales, supra,* p. 101; *People* v. *Molineux, supra,* pp. 297-299; *People* v. *Peckens, supra; Mayer* v. *People, supra.*) In such cases it is recognized that "proof of intent is often obtainable except by evidence of successive repetitions of the act." *People* v. *Molineux, supra,* p. 298.)

Analytically, the problem is one of the similarity of the other misconduct with the crime charged. (*People* v. *Dales, supra,* p. 101; *People* v. *Molineux, supra;* 2 Wigmore, *supra,* § 302; Richardson, *supra,* § 182.) To quote from Professor Wigmore, "Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance." (2 Wigmore, *supra,* § 302, p. 200.)

Here, the evidence of defendant's other misrepresentations is highly relevant on the issue of his intention to defraud in the crime charged and discloses a pattern of obtaining money by false pretenses over a two-year period prior to the crime charged. (Fisch, New York Evidence [1959], § 217; *People* v. *Goldstein,* 295 N.Y. 61, 65; *People* v. *Dales, supra; People* v. *Thompson,* 212 N.Y. 249; *People* v. *Shulman,* 80 N.Y. 373n., 376n. [76 N.Y. 624]; cf. *People* v. *Peckens, supra;* cf. *People* v. *Warder,* 231 App. Div. 215.) There can be no doubt, then, that evidence that defendant mortgaged a 1962 Cadillac which he did not own had an important bearing on the vital issue

of whether the defendant assigned the account receivable with intent to defraud. Accordingly, evidence of this chattel mortgage was admissible on the issue of defendant's intention in respect to the crime charged, and contradiction of defendant's answers concerning this mortgage, therefore, was not a collateral matter.

We conclude, therefore, that the cross-examination of defendant and the introduction of documentary evidence concerning these other crimes was proper.[1] This evidence was relevant to the crucial issue of defendant's intention to defraud, as well as to his credibility. It follows that the jury was properly instructed that they could give this evidence its logical probative weight on the issues of defendant's credibility and intention.

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[1] Although the Trial Judge initially stated that use of documentary evidence during cross-examination of defendant was admissible to impeach his credibility, the court subsequently ruled during the same cross-examination that this evidence was also admissible on the issue of defendant's intention in the crime charged. The People established a sufficient relationship between the crime charged and the alleged other criminal acts to justify admission of this evidence of other crimes on the issue of defendant's intention. Defendant was then presented on redirect examination with the opportunity to rebut all alleged instances of his other misconduct and to establish any purported lack of relationship between the alleged misconduct and the crime charged. The record does not support the dissenters' contention that defense counsel was prevented from exploring the relationship between the alleged other misconduct and the crime charged during redirect examination. To the contrary, defense counsel was afforded wide latitude in asking defendant specific questions on redirect examination to show the circumstances of his other alleged misconduct. The lack of factual support in the record for the dissenters' position is shown by the fact that defendant has not even argued in this court that he was prevented from establishing any purported lack of relationship between the other alleged misconduct and the crime charged because of the trial court's rulings during his redirect examination.

Appendix A

We note that procedural orderliness generally mandates that a party adduce all its proof during its direct case (6 Wigmore, *supra,* § 1873.) This would have been the better practice in the instant case. (Cf. 2 Wigmore, *supra,* § 307.) However, the trial court has broad discretion over the nature and extent of cross-examination (*Langley* v. *Wadsworth,* 99 N. Y. 61, *supra*), including the right to vary the prescribed order of the trial and the normal order of proof. (Code Crim. Pro., § 388; cf. *People* v. *Koerner,* 154 N. Y. 355, 367-369; cf. *People* v. *Seiler,* 246 N. Y. 262.)

Here, the People established a prima facie case of defendant's intention to defraud by evidence that he assigned the same account receivable twice while representing to the second purchaser that the account was free and clear. In defense, the defendant testified that the second assignee (complainant) was chargeable with knowledge that the receivable had been previously assigned. Both the second assignee and her husband denied knowledge of the prior assignment. At this juncture, the People were confronted with a novel and unexpected explanation. The use of documentary evidence relevant to defendant's intention to defraud during cross-examination was within the sound discretion of the trial court under these circumstances. (*Langley* v. *Wadsworth, supra; People* v. *Koerner, supra.*)

The court did, however, permit one clear error. It is settled that reversible error is committed when a prosecutor *with knowledge* of an acquittal cross-examines a defendant concerning the criminal charge on which he has been acquitted. (*People* v. *Santiago,* 15 N Y 2d 640.) This is in keeping with the general rule that knowing use of false evidence or allowing it to remain uncorrected denies due process. (*People* v. *Savvides,* 1 N Y 2d 554; cf. *Napue* v. *Illinois,* 360 U.S. 264, 269.)

The record discloses that defendant was asked near the close of his lengthy cross-examination about a $100 check

which he issued to one Charles Mendell in 1964. Defendant replied, "The Judge threw that out in the courtroom." His attorney's request for a mistrial was denied.

The back of the information pertaining to the Mendell check indicates that the charge was tried in the Nassau County District Court and dismissed at the close of the prosecution's case on February 25, 1965. This dismissal is tantamount to acquittal of the charge after trial, and the cross-examination of defendant concerning this check was, therefore, error. (*People v. Cascone,* 185 N. Y. 317, 334; *People* v. *Santiago, supra.*)

Our decision in *Santiago* (*supra*) is inapposite, however, as here the record discloses that the District Attorney questioned defendant in good faith and in ignorance of his acquittal of the charge involving the Mendell check. Specifically, the District Attorney demonstrated his good faith at trial by showing that "print record" which he had before him was complete to June 4, 1965 and showed that defendant had not been tried since 1963. Defendant's February, 1965 acquittal of the Mendell check charge did not appear on the District Attorney's record. We note that defendant's counsel and the Trial Judge both remarked that they were not accusing the District Attorney of bad faith in regard to the Mendell check.

Logically, the inference the jury might draw from this error was that defendant had been charged concerning the Mendell check and had been acquitted. Certainly, this one answer in itself cannot have influenced the result in this case in view of the strong evidence of defendant's guilt and the proper cross-examination of defendant concerning 21 other similar fraudulent transactions and worthless checks which were more damaging to his credibility. Under these circumstances, the error is harmless beyond a reasonable doubt. (Code Crim. Pro., § 542; see, e.g., *People v. Kingston,* 8 N Y 2d 384; *Chapman* v. *California,* 386 U. S. 18; *Fahy* v. *Connecticut,* 375 U. S. 85.)

Finally, defendant contends that the trial court committed reversible error by commenting upon his right to appeal his conviction. However, there was no objection or exception to that part of the charge and no request was made to charge differently. This alleged error, therefore, is nonreviewable. (Code Crim. Pro., § 420-a; *People* v. *Simons,* 22 N Y 2d 583, 541; *People* v. *Feld,* 305 N. Y. 322, 332.)

Accordingly, the judgment of conviction should be affirmed.

BURKE, J. (dissenting). The record before us in this case discloses incidents at the trial which I regard as so prejudicial to the defendant-appellant's rights as to require a reversal of the judgment of conviction and a new trial.

Herbert Schwartzman stands convicted upon an indictment which charged that, on September 24, 1964, he sold to a Mrs. Gladstone certain accounts receivable of the Safety Circuit Corporation "with the intent to deprive and defraud" her by use of false and fraudulent misrepresentations. He was convicted of larceny in the first degree. At that trial, defendant testified in his own behalf and stated that, when he sold these accounts receivable valued at $1,592 to Mrs. Gladstone for $1,000, she had knowledge of the prior assignment of these accounts.

After testifying in this limited manner, defendant was subjected to an extensive cross-examination. At this time, the prosecutor introduced, over objection, documentary evidence which related to prior bad acts, allegedly committed by the defendant. Defendant contends that this documentary evidence was inadmissible when introduced and that the court's failure to prohibit the admission initially and its refusal to give a proper charge on the evidence at the conclusion of the trial constitute adequate and independent grounds for a reversal in this case.

It is, of course, undisputed that a witness' answers concerning collateral matters cannot be contradicted by the use of extrinsic evidence. It is equally established that documentary evidence is admissible when it relates to a fact material to the prosecution. To this extent, I am in full accord with the majority opinion (pp. 243-246). Until today, it had also been firmly settled that the law drew a distinction between impeaching the credibility of a witness by documentary evidence and establishing an essential element of a crime by the same means. (See, e.g., *People* v. *Malkin*, 250 N. Y. 185, 201.) While the law recognizes such distinctions, courts have been quick to acknowledge that "juries often disregard such distinctions" (250 N. Y., p. 201, *supra*). Nevertheless, the rule had always been that, where evidence is competent when introduced for one purpose and incompetent for another, it is not rendered inadmissible, but will be permitted for the sole purpose for which it is competent. (See, e.g., Richardson, Evidence [9th ed.], § 6; Fisch, New York Evidence [1959], § 16.) Indeed, in analogous situations to the case at bar, it has been continually held that evidence of similar misdeeds is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition. (*United States* v. *Deaten*, 381 F. 2d 114 [2 Cir.]; *United States* v. *Knohl*, 379 F. 2d 427, 439 [2d Cir.]; see, also, *People* v. *Adams*, 21 N Y 2d 397.) In the latter case, this court concluded, in an opinion by Judge Scileppi, that, although the evidence was technically admissible for a limited purpose, the summation of the District Attorney was such as to vitiate whatever protection cautionary instructions would afford.

As I read the majority's opinion, it is their contention that, since the introduction of this documentary evidence might have been relevant to the crucial issue of intent, it thereby became relevant for purposes of impeaching the

defendant's credibility (p. 249). Such a conclusion goes far beyond prior decisions of this court and indeed encroaches upon the well-settled policy of this State that "One may not be convicted of one crime on proof that he probably is guilty because he committed another crime". (*People* v. *Goldstein*, 295 N. Y. 61, 64.) While the majority indisputably possesses the power to change this entrenched and well-reasoned rule, I find that, in their attempt to justify the admissibility of prejudicial evidence in this way, they have seized upon a premise which is in itself defective. I refer to their conclusion that this documentary evidence was relevant—as admitted—to the crucial issue of intent.

While I do not disagree with the majority that evidence of other prior misdeeds is admissible where intent is in issue (*People* v. *Molineux*, 168 N. Y. 264), I cannot ignore the significant limitation which has been imposed by numerous jurisdictions, including New York, that this evidence must refer to events which have reference to the specific charge by reason of the proximity of time, place and circumstance. (*People* v. *Molineux*, 168 N. Y., *supra*, p. 300; see, also, *Patterson* v. *United States*, 361 F. 2d 632 [8th Cir.]; *United States v. Kirkpatrick*, 361 F. 2d 866 [6th Cir.]; *United States* v. *D'Antonio*, 362 F. 2d 151 [7th Cir.]; *Reed* v. *United States*, 364 F. 2d 630 [9th Cir.]; *Pardo* v. *United States*, 369 F. 2d 922 [5th Cir.]; *Boggs* v. *State*, 268 Ala. 358; *Dorsey* v. *State*, 25 Ariz. 139; *Stone* v. *State*, 162 Ark. 154; Richardson, Evidence [9th ed.], §§ 177, 182; Fisch, New York Evidence [1959], § 217; Ann., Evidence—Similar False Pretenses, 78 TALR 2d 1359, 1365-1367, § 2, subd. [b], and cases cited therein.)

In the instant case, each time the defendant's attorney objected to the introduction of the documents referred to by the majority, the trial court overruled him, com-

menting (incorrectly) that the documents were admissible to impeach the defendant's credibility. The following colloquy, concerning a chattel mortgage executed on June 21, 1962 and given to the Franklin National Bank, is illustrative of similar rulings at trial:

> "Mr. Gulney [prosecutor]: I offer it [a copy of the chattel mortgage] in evidence at this time, your Honor.
>
> "The Court: Show it to Mr. Sutter [defendant's trial counsel].
>
> "Mr. Sutter: I object to the introduction of the proposed exhibit on the basis, number one, it is an incomplete document, the terms and conditions are not completed therein; number two, it is with respect to a collateral matter * * *
>
> "The Court: I overrule your objection. I am accepting this as to impeach his credibility."

Had the trial court admitted the evidence for purposes of establishing the defendant's intent to defraud, the defendant's attorney could then have challenged the admissibility of such evidence on the ground that it was not sufciently related to the crime charged either in time, circumstance or place. (*People* v. *Molineux,* 168 N. Y., *supra,* p. 300.) Defendant's attorney was not permitted to challenge the tendered documents pursuant to *Molineux* when the court ruled that said documents were admitted solely to impeach credibility. As the majority indicates a "cross-examiner cannot *contradict* a witness' answers concerning collateral matters by producing extrinsic evidence for the *sole purpose* of impeaching credibility" (p. 245). As a result, the Judge erred in his reason for admitting the evidence and by this error precluded the defendant's attorney from contesting the admissibility of

this evidence. The subsequent shift in position by the court, at the conclusion of the cross-examination, when it was asserted for the first time that these documents were admitted to prove the defendant's intent as well as to impeach his credibility was ineffective insofar as the defendant's right to a fair and impartial trial is concerned.[1] Moreover, when the defendant's attorney, on redirect examination, asked the defendant specific questions relating to these documents, he was told that the questioning was improper as the issues were collateral. In effect, then, the Judge precluded all efforts by the defendant's attorney to show that these documents did not establish his intent to commit the crime. The rule of *People* v. *Molineux* was itself a departure from the gen-

[1] The cross-examination of defendant Schwartzman began on page 389 of the trial transcript. The entire cross-examination covered 90 pages. It was not until the defendant had been examined by the prosecutor for 84 of these pages that the Trial Judge first suggested that the documents—then firmly embedded in the record—might be admissible to show the defendant's intent. The majority would require the defendant's attorney to attempt at this stage of the cross-examintion to show that the prosecution could not have properly introduced these documents on the issue of intent. Obviously, the burden should fall on the prosecutor to show that these documents which he introduced were admissible under *People* v. *Molineux* (168 N. Y. 264, *supra*) and *People* v. *Dales* (309 N. Y. 97). Instead the prosecutor told the jury in his summation that, "as I recall, his [defendant's] testimony seemed to indicate that in the past he had given chattel mortgages on property he did not own, and that he had given checks to people knowing that the amount of the check was not in the bank; * * * the reason we asked him those questions [was] to establish to you whether or not his testimony is worthy and was worthy of belief." It is indeed a novel doctrine to require the defense counsel, under these circumstances, "to rebut all alleged instances of his [defendant's] other misconduct and to establish any purported lack of relationship between the alleged misconduct and the crime charged."

eral restriction imposed against the introduction of similar acts. The present decision, it is submitted, goes far beyond the carefully considered and restrictive rules set forth in prior cases. (See, e.g., *People* v. *Molineux,* 168 N. Y. 264, *supra; People* v. *Dales,* 309 N. Y. 97, *supra.*) One can only speculate whether those decisions are this day overruled.

The errors discussed above were further compounded when the District Attorney questioned the defendant in reference to a charge of which he had been acquitted. The totality of circumstances in this case, I feel, precludes us from stating that "the error is harmless beyond a reasonable doubt" (p. 251).

In concluding, I would merely emphasize the following passage from Justice SUTHERLAND'S opinion in *Funk* v. *United States* (290 U. S. 371, 381): "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." The trial procedure employed below prevented the defendant from developing the truth. Accordingly, I would reverse the judgment of conviction and order a new trial.

Judges SCILEPPI, BERGAN and BREITEL concur with Judge JASEN; Judge BURKE dissents and votes to reverse and order a new trial in a separate opinion in which Chief Judge FULD and Judge KEATING concur.

Judgment affirmed.